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EXHIBIT 1

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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. CITY OF OAKLAND, CALIFORNIA, Defendant.	No. C-89-3305 JPV MEMORANDUM OF OPINION AND ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ENTERED IN CIVIL DOCKET 8/24/90

INTRODUCTION

Plaintiff's Motion for Partial Summary Judgment, Defendant's Motion for a Continuance Pursuant to Rule 56(f), and Defendant's Cross-Motion for Summary Judgment were heard on April 27, 1990. Richard C. Stearns of the Department of Justice appeared on behalf of plaintiff. Peter J. Busch of Howard, Rice, Nemerovski, Canady, Robertson & Falk appeared on behalf of defendant. The court has considered the briefs filed by the parties and various *amici curiae*, as well as the oral arguments of counsel. Good cause appearing, the court now GRANTS plaintiff's motion for partial summary judgment, and DENIES defendant's motions.

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BACKGROUND

The City of Oakland's Nuclear Free Zone Act, Ordinance No. 11062 (the "Ordinance"), was adopted by the voters of Oakland, by initiative, on November 8, 1988. Plaintiff brought suit in September 1989, challenging certain portions of the Ordinance as facially unconstitutional and preempted by certain federal statutes, regulations, and executive orders.

The Ordinance prohibits any person, within the City of Oakland, from knowingly engaging in "nuclear weapons work," which is defined as "any work that has as its purpose the development, testing, production, maintenance or storage of nuclear weapons, the components of nuclear weapons, or any secret or classified research or evaluation of nuclear weapons." The definition of a "person" contained in the Ordinance includes the federal government and private firms performing under contract to the federal government.

The Ordinance also restricts the transportation of "nuclear weapons or other hazardous radioactive materials" through Oakland, and prohibits any person from reprocessing, storing, dumping, or using "hazardous radioactive materials" within Oakland. Further, the Ordinance prohibits Oakland, except in certain limited situations, from contracting with, investing in any person or company "knowingly engaged in nuclear weapons work," or with their "agent, subsidiary or parent organization." It also bans the operation or construction of nuclear reactors in Oakland, and requires facilities engaged in nuclear weapons work

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to post signs, "clearly visible to any passing person," bearing the legend "Nuclear Weapons Work Conducted Here." It requires annual reports by persons engaged in activities covered by the Ordinance describing those activities and the "steps being taken to cease such activities within two years" of the Ordinance's passage. It contains civil enforcement provisions, including authorization of citizen suits, and provides criminal penalties for violations of its provisions.

Plaintiff attacks those portions of the Ordinance that purport: 1) to prohibit nuclear weapons work; 2) to regulate the use or transportation of nuclear weapons and hazardous radioactive materials; 3) to prohibit, with some exceptions, Oakland from contracting with, or investing in nuclear weapons makers; 4) to prohibit operation and construction of nuclear reactors; 5) to require the posting of signs at facilities engaged in nuclear weapons work; and 6) to require annual reports by persons engaged in activities covered by the Ordinance.

Plaintiff does not challenge those portions of the Ordinance that regulate investments by the City of Oakland in United States Treasury securities and that require the posting of "Nuclear Free Zone" signs at city boundaries.

Plaintiff asserts in its complaint that various portions of the Ordinance violate the Supremacy Clause (Art. VI, cl. 2), the War Powers Clauses (Art. I, sec. 8, sub. 11-14, and Art. IV, sec. 4), the Commerce Clause (Art. I, sec. 8), the Property Clause (Art. IV, sec. 3, cl. 2), and the Enclave Clause (Art. I,

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sec. 8, sub. 17) of the United States Constitution. Plaintiff also asserts that various portions of the Ordinance are preempted by the Hazardous Materials Transportation Act, 49 U.S.C. §1801 et seq., and regulations issued thereunder; the Atomic Energy Act, 42 U.S.C. §2011 et seq.; and federal regulations, statutes, and executive orders prohibiting the public disclosure of classified and sensitive unclassified information.

Plaintiff moved for summary judgment in January, 1990 on all causes of action in its complaint except the second, which alleges that the Ordinance violates the Commerce Clause of the Constitution. The City of Oakland opposed plaintiff's motion, and filed a cross-motion for summary judgment on all causes of action in the complaint and a motion for a continuance to permit discovery on outstanding factual issues. Fed. R. Civ. P. 56(f).

On January 29, 1990, plaintiff filed a motion for a protective order staying discovery. Because it appeared that there were threshold legal issues to be resolved, the court granted that motion by order dated February 1, 1990, and stayed discovery pending the outcome of the motions for summary judgment now before the court.

DISCUSSION

The court finds that there are no genuine issues of material fact, and that good cause exists to grant plaintiff's motion and to deny defendant's motions. The Ordinance taken as a whole is so comprehensive, so complete, so all-encompassing that it cannot help but conflict with the rights and authority of the

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federal government. In arriving at this conclusion, the court is not unmindful of two important legal considerations. First, whenever possible, statutes should be construed so as to avoid conflict with the Constitution. Second, there is a presumption against preemption of state law by federal law, and generally state laws should be analyzed point by point for actual conflicts with federal law.

1. Federalism:

By creating a federal system in which power is shared by states and the federal government, and distributed among branches of government, the framers of our Constitution carefully ensured that no single individual or group gained unchecked power. These divisions do not merely preclude the majority from infringing upon the rights of a minority -- they also ensure that a minority, which is locally influential, does not act outside its zone of authority and thereby interfere with the will of the broader majority.

Under the framers' plan, a zone of authority is reserved for the states (and derivatively for local governments), and another is granted the federal government. Some matters lie beyond the authority of both the states and the federal government, and others lie within the authority of both. However, where there is a conflict, the federal government, if acting within its demarcated bounds, is supreme. Thus, in McCulloch v. Maryland, 17 U.S. 316, 436 (1819), Chief Justice Marshall wrote: "the states have no power by taxation or

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otherwise to retard, impede, burden or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."

Defense policy is clearly within the zone of authority granted the federal government. U. S. Constitution, Art. I, sec. 8, sub. 11-14. As to defense policy, the people of the City of Oakland are not without a voice; however, theirs is not the only voice.

Thus, to some extent, the people of the City of Oakland sacrifice self-determination. However, absolute self-determination would undermine democracy, as well as the rule of law. In a democracy, those in the minority must sacrifice self-determination and agree to abide by, and live under the law of the majority.

An example from history illustrates this point. The Kentucky and Virginia Resolutions, constructed by Thomas Jefferson and James Madison, presumed that any state could render a federal law unenforceable by determining that the law exceeded the limits of federal authority. These resolutions were invoked at the time of the Civil War. If we learned any lesson from that war, it is that localities that have views that differ from those of the nation as a whole may not exempt themselves from the duly enacted laws of the nation.

2. Constitutionality of the Ordinance:

Among other things, Oakland's Ordinance prohibits nuclear

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weapons work; regulates the use or transportation of nuclear weapons and hazardous radioactive materials; prohibits, with some exceptions, Oakland from contracting with, or investing in nuclear weapons makers; requires the posting of signs at facilities engaged in nuclear weapons work; and requires annual reports by persons engaged in activities covered by the Ordinance. These provisions, in purpose and effect, interfere with the federal government's constitutional responsibility and authority to provide for the common defense. The exercise of war powers is the exclusive province of the federal government under the Constitution. See Tarble's Case, 80 U.S. 397, 408 (1871). States and localities may not enact legislation that impedes or hinders the national defense, regardless of whether the defense activities are carried out directly by agencies of the federal government, or by private contractors acting as agents of the federal government. As the New York Court of Appeals stated in Fosella v. Dinkins, 494 N.Y.S.2d 878, 880, 110 A.D.2d 227 (N.Y.), aff'd., 66 N.Y.2d 162, 495 N.Y.S.2d 352, 485 N.E.2d 1017 (1985):

> [a] State or political subdivision of a State may not hinder the Federal Government's deployment of conventional or nuclear weapons within its territory simply because of a concern -- perceived in good faith as it might be -- that the presence of such weapons would constitute a danger to the local population. This becomes apparent when one reflects that if every local government was given the power to restrict the establishment and operation of Federal military installations or weaponry located within its geographic jurisdiction, the power of the Federal Government to raise and maintain an army or navy would, as warned by the United States Supreme Court in Tarble's Case, be destroyed.

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In City of Los Angeles v. United States, 355 F.Supp. 461, 464 (C.D. Cal. 1972), Los Angeles sought damages from the United States for failure to pay municipal pilotage fees for entering and departing Los Angeles Harbor. All of the vessels listed in the complaint (except two) were United States Naval ships. All were involved in defense related activities. The court ruled for the United States, finding that Los Angeles was impermissibly trying "to regulate and control the manner in which [the United States] shall carry on War or provide for the National Defense." See also Feliciano v. United States, 297 F.Supp 1356 (D.P.R. 1956), aff'd., 422 F.2d 943 (1st Cir.), cert. denied, 400 U.S. 823 (1970) (Puerto Rico could not render inapplicable executive order that created the Culebra Island Naval Defensive Sea Area).

Defendant argues that a local enactment may not be invalidated on the basis of the War Powers Clauses unless the interference with the federal government is direct or substantial. In support of this standard, defendant cites De Canas v. Bica, 424 U.S. 351, 354-55 (1976) (local regulation upheld if it "has some purely speculative and indirect impact" on an exclusive federal power), and Penn Dairies v. Milk Control Commission, 318 U.S. 261, 275 (1943) ("An unexpressed purpose of Congress to set aside statutes of states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command . . . is ambiguous."). The court disagrees with defendant's statement of the applicable standard.

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However, even if the standard advanced by defendant applied, the court would reach the same conclusion. The Ordinance's interference with the federal government may be small relative to the global extent of defense operations, and no one would argue that Oakland's Ordinance, in and of itself, poses an insurmountable risk to national security. However, the Ordinance is so broad that it will clearly interfere with United States defense policy directly and substantially.

Defendant also cites Arthur D. Little, Inc. v. Commissioner of Health & Hospitals, 395 Mass. 535, 481 N.E.2d 441 (1985). In Arthur D. Little, the Supreme Judicial Court of Massachusetts upheld a local prohibition against "testing, storage, transportation and disposal" of five highly toxic chemical warfare agents within city limits. The court noted that "not every regulation which has some incidental effect on a defense program is invalid under the supremacy clause." Id. at 449.

Without necessarily agreeing with the reasoning or outcome of Arthur D. Little, the court finds it distinguishable. The regulation in Arthur D. Little was a relatively narrow public health and safety regulation. On the other hand, Oakland's much broader Ordinance, which regulates city investments and contracts, and which expresses a general disapproval of nuclear weapons, is clearly designed to interfere with, and encourage change in federal nuclear policy.

Finally, defendant cites Board of Trustees v. City of

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Baltimore, 317 Md. 72, 562 A.2d 720 (1989), in support of its position that the Ordinance's restrictions on contracting and investing are constitutional. In Board of Trustees, the Court of Appeals of Maryland upheld two Baltimore City ordinances requiring Baltimore employee pension systems to divest their holdings in companies doing business in South Africa.

However, Board of Trustees did not involve interference with the national defense authority of the United States, and the United States was not a party to the action. Furthermore, in Board of Trustees, the court found that Baltimore's ordinances did not "interfere" with or "frustrate" federal law, and that the effect of the ordinances was "minimal and indirect." Id. at 743, 744 and 746. In contrast, Oakland's effort to "punish" firms for performing nuclear weapons work constitutes a direct interference with exclusive federal war powers.

The court concludes that those provisions of the Ordinance that prohibit nuclear weapons work; regulate the use or transportation of nuclear weapons and hazardous radioactive materials; prohibit, with some exceptions, Oakland from contracting with, or investing in nuclear weapons makers; require the posting of signs at facilities engaged in nuclear weapons work; and require annual reports by persons engaged in activities covered by the Ordinance, violate the War Powers Clauses of the Constitution.

3. Preemption:

Various provisions of the Ordinance are also inconsistent

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with, and preempted by certain federal statutes, regulations, and executive orders. The court recognizes that there is a presumption against preemption of state law by federal law. Furthermore, unless the federal government "evidences an intent to occupy a given field," there must be an actual conflict between state and federal law for the state law to be preempted. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984).

The Ordinance restricts transportation of "nuclear weapons or other hazardous radioactive materials." These provisions are preempted by the Hazardous Materials Transportation Act ("HMTA"), and regulations issued thereunder, which occupy the field of radioactive materials transportation safety. See Department of Transportation Inconsistency Ruling No. IR-30, 55 Fed. Reg. 9678 (March 14, 1990) (finding that the provisions of the Ordinance that apply to the transportation of hazardous materials, including the loading, unloading, and storage incidental to that transportation, are inconsistent with the HMTA and its regulations).

The Ordinance also regulates the military applications of atomic energy and the safety aspects of nuclear development. In these respects, it is preempted by the Atomic Energy Act. See 42 U.S.C. §§2013(c) and 2021; Silkwood, 464 U.S. at 250; Stokes v. Bechtel North American Power Corp., 614 F.Supp. 732, 739-41 (N.D.Cal. 1985). Defendant argues that the City of Oakland may regulate civilian nuclear reactors, and plaintiff concedes in its briefs "that the City has a very limited role to play in the

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location and construction of civilian nuclear reactors." Reply Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment at 20 n.22. However, the Ordinance extends beyond the bounds of Oakland's limited role.

Finally, the reporting provisions of the Ordinance are in actual conflict with, and therefore preempted by, the federal regulations, statutes and executive orders that prohibit the disclosure of classified and sensitive unclassified information. *See, e.g.*, 42 U.S.C. §§2163, 2165, 2168 and 2274; Executive Order 12356 (50 U.S.C. §410 Note) and 10 U.S.C. §130.

4. Severability:

The Ordinance has a severability provision that provides that "[i]f any section, subsection, paragraph, sentence or word of this [Ordinance] shall be held to be invalid, either on its face or as applied, the invalidity of such provision shall not affect the other sections . . . ." Defendant has argued that this severability provision should be applied to retain those portions of the Ordinance that plaintiff does not challenge.

So many provisions of the Ordinance are either unconstitutional or preempted that the court could easily conclude that the few provisions that remain cannot stand separate from the whole and still reflect the will of the people. However, this issue is not before the court and will not be addressed at this time. Those portions of the Ordinance that are not challenged by plaintiff shall remain in effect, and are not affected by this order.

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ORDER

Accordingly, IT IS ORDERED AS FOLLOWS:

1) The Court declares those portions of the Ordinance that prohibit nuclear weapons work; that regulate the use or transportation of nuclear weapons and hazardous radioactive materials; that prohibit, with some exceptions, Oakland from contracting with, or investing in nuclear weapons makers; that require the posting of signs at facilities engaged in nuclear weapons work; and that require annual reports by persons engaged in activities covered by the Ordinance, facially unconstitutional and invalid, in violation of the War Powers Clauses of the United States Constitution.

2) The Court declares those portions of the Ordinance that restrict transportation of nuclear weapons or other hazardous radioactive materials; that regulate the military applications of atomic energy and the safety aspects of nuclear development; and that require reports by persons engaged in activities covered by the Ordinance, preempted by the Hazardous Materials Transportation Act, 42 U.S.C. §1801 et seq., and regulations issued thereunder; the Atomic Energy Act, 42 U.S.C. §2011 et seq.; or federal regulations, statutes and executive orders prohibiting the disclosure of classified information and sensitive unclassified information.

3) The Court enjoins enforcement of all substantive provisions of the Ordinance with the exception of Section 7(b)(i), (ii) and (iii) (which relate to investment by the City

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of Oakland in United States Treasury securities), and with the exception of that portion of Section 9(a) that requires the posting of signs on city streets at the city boundary.

4) Plaintiff's Motion for Partial Summary Judgment is GRANTED.

5) While plaintiff does not move for summary judgment on its second cause of action, that cause of action, which alleges that portions of the Ordinance violate the Commerce Clause, is moot as a result of this order.

6) Defendant's Motion for a Continuance pursuant to Rule 56(f) is DENIED.

7) Defendant's Cross-Motion for Summary Judgment is DENIED.

IT IS SO ORDERED

DATED: AUG 20 1990

J. P. VUKASIN, JR.
UNITED STATES DISTRICT JUDGE

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Pursuant to and in accordance with this court's Order dated August 20, 1990 granting plaintiff's Motion for Partial Summary Judgment, judgment is hereby entered in favor of plaintiff and against defendant.

IT IS SO ORDERED

DATED: AUG 20 1990

J. P. VUKASIN, JR.
UNITED STATES DISTRICT JUDGE

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